IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

2005 APR 11 P 4: 19

SHARON LEA MANNING WAID,

Plaintiff,

VS.

CASE NO. 2:06-cv-171-MEF

BUDGET RENTAL CAR, Inc. et. al.

Defendants.

PLAINTIFF'S BRIEF AND DOCUMENTS IN SUPPORT OF OBJECTION TO UNITED STATES' MOTION TO DISMISS

This cause begin with the filing of a Notice of Removal by the United States of America of the Plaintiff's Civil Lawsuit for personal injuries filed on August 26, 2003, in the Circuit Court of Montgomery County, Alabama on February 24, 2006. This removal Motion was based on the averments by the government in accordance of 28 U.S.C. Section 1446 (d) of Defendant, Regina V. Freeman, being a member of the United States Air Force and acting in the line and scope of her duties at the time that the Plaintiff averred that Defendant Freeman negligently drove her car into the back of the Plaintiff car in Montgomery, Alabama proximately causing the Plaintiff to suffer both grievous personal injuries and damages to her car.

Subsequently based on the averment that the Plaintiff filed a form 95 claim against the United States Air Force on the same date the government filed a Motion to Dismiss based on lack of subject matter jurisdiction and lack of service on the Defendant Freeman. There is a second Defendant in this matter based on a Count 11 averment in the Complaint that the Plaintiff filed against Budget Rent A Car, Inc. which is a negligent entrustment claim and which the government although not alleging any representation per se of Budget Rent A Car, Inc. is attempting to have dismissed. Since the state Statue of Limitation has run on this matter on August 26, 2005, said dismissal without representation and subject matter jurisdiction would be highly prejudicial and fatal to that claim by the Plaintiff. It should be stated that service was perfected on Defendant; Budget Rent A Car, Inc. on September 2, 2005.

The Plaintiff submits that the issues herewith are whether the State Court action that is now the Federal Court Civil action should be dismissed for this Court's lack of subject matter jurisdiction due to the filing of the form 95 claim at the same time as the State Court action on August 24, 2005. Secondly, the government asserts the issue of failure to have service on Defendant Freeman in applicable ruling with the Rules of Federal Procedure.

The Plaintiff submits that she has a state Law right to file an action against a personal for negligently injuring her and against a business entity for negligently breaching its duties and entrusting a vehicle to an unsafe driver who subsequently injures her by her own personal actions. The same is asserted by the Plaintiff for her negligent entrustment action against Defendant Budget Rent A. Car, Inc.

In <u>Gutierrez de Martinez vs. Lamagno</u>, 515 U. S. 417, our Supreme Court gave guidelines as to the application of the "Westfall Act" which is the playing field in the instance case. ""Second, when a government official's determinations of a fact or circumstance-for example "scope of employment" is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable. Instead, federal judges traditionally proceed from a the "strong presumption that Congress intends

judicial review." <u>Bowen V. Michigan Academy of Family Physicians</u>, 476 U. S. 667, 6770 (1986)

The Plaintiff avers that the government has submitted neither trustworthy testamentary evidence nor documentary evidence backing up its claims of an employer-employee relationship with Defendants Freeman and Budget Rent A Car, Inc. Thus, this matter on the personal actions of Defendants Freeman and Budget Rent A Car to be returned to the State Court for resolution and the form 95 claim on the employer-employee action is to be allowed to exhaust administrative remedies. Aught to say none of the affiants were present and can not reasonable be deemed to offer any statements of whether the Defendant Freeman was within the line and scope of her duties at the time she drove her car into the back of the Plaintiff causing personal injuries. Additionally the dismissal of the personal action against Defendant, Budget Rent A Car, Inc. would disarm Plaintiff's rights and cause a demise of that action as the State statue of limitation run on August 26, 2005.

The Plaintiff avers that the government is attempting to have the service issue both ways by demanding a dismissal for lack of service. The State court action shows a service attempt on Defendant Freeman in the State of Arizona in September 0f 2005 with a return "vacant": The government did not insert its position in this matter until months later on February 24, 2006 via a Removal Motion with a hearsay Certification on Scope of Employment by the Attorney General. Thus, this matter has been before this Honorable Court for a period of approximately one month and a half with the government having now filed a dismissal motion. The Plaintiff submits that the government is attempting to have it both ways by inserting the Removal Motion and then claiming that

it is exempt from the liability of the Defendant Freeman who drove her car into the back of the car being lawfully driven by the Plaintiff with Defendant Freeman's explanation that "she was looking at buildings." Plaintiff submits that until a review by this Honorable Court on the trustworthy allegations of the Removal of this matter from State Court that the Plaintiff can not reasonable be in a position in proceed with the prosecution of this matter.

The Plaintiff submits that the government's Motion to Dismiss should be denied and the matter restored to the State Court Docket where the matter was headed to mediation by Court Order. The Plaintiff submits that if the government can evidentially and procedurally proved by trustworthy sufficient legal evidence that there is an employer-employee relationship with the Defendant Freeman at the time she negligently drove her car into the back of the Plaintiff's care then in that event the timely filed form 95 against the Air Force should be allowed to proceed through administrative channels to a final solution.

Father the Plaintiff submits that there is the application of 28 U. S. C. 2679 (5) sets forth the applicable rule in that if the form 95 "claim would have been timely had it been filed on the date the underlying civil action commenced, and the claim is presented to the appropriate Federal Agency within 60 days after the dismissal of the Civil action." This cause of action is subsequently different from any personal liabilities that Defendant Freeman has outside any federal protection. The Plaintiff submits that even employee of the Federal government can be liable for their personal action which wrongfully causes injuries to a person.

The Plaintiff submits that the matter of the Defendant, Budget Rent A Car, Inc. is to be remanded to the State Court as the government has made no employer-employee assertion on behalf of that Defendant.

The Plaintiff respectfully prays for an Order Denying the government's Motion to Dismiss on the subject cause.

Respectfully submitted this the 11th day of April 2006.

ATTORNEY FOR PLAINTIFF

AST-27 REV. 1/91			6-cv-00 4L/ABAMEAFUDIREB	RMDToraffied A80	CIDENTE OR EPAPER	17/2006°S Page 6	6 of 7
Shaded Areus	Îo Be I	Used By Data Processing Only	Sheet of She	et) Microfilm No	DATA PR	CESSED, NO.	06622
LOCATION AND TIME		Date 3 26 2003 Time Month Day Year 17 Con Street, Road or Highway	AM Day of Week County Cri	nav Tooner	Rural 3	F—Interstate F—Federal O1 Overturned O2 Fire/Explosion O5 Spill	EVENT 08 - Parts / Cargo Fell From Moving Vehicle
		CASEMICH AFC Street or Road or Code	RO CARMICHOTEL	CT. TRIN	(Circle One)	COLLISION EVENTS OF Jackhnied 15 - Pedestrian(s) COLLISION EVENTS OF Jackhnied 15 - Pedestrian(s) COLLISION EVENTS OF Jackhnied 10 - Paried Vehicle St. Mailboxies OF Jackhnied 10 - Paried Vehicle St. Barricade 10 - Barricade	/b - Uverpass/Underpass
LOCATI		intersection Related 1 - Node 1 2 Node 2 N: Not lot: Related First Harmful Event Event Location	Access 1 Main Rd Hway 2 Frontage Rd Loc 2 Frontage Rd Fixed Object No. of Vehicles No. Pedestrian	3 - Interchange 5 - Exit Ramp (4 - Entrance Ramp ON/A No. Injured No. Fatalities (Prime Contr Unit No	40 - Pedal Cyclist 64 - Birdge Rail 45 - Animal 55 - Culver Their 51 - Court Frail 68 - Culcuring 52 - Crash Cushion 67 - Retaining Vi 53 - Unlify Pole 68 - Median Bar 54 - Non-breakaway Light 69 - Sidestione 55 - Tree - Trie Hydrant 72 - Fence 57 - Pier or Column 73 - Boulder 18 - Boulder	olwaii 80 - Guy Wire 11 - Breakaway Light Frail 22 - Overhead Object Frier 84 - Bridge Abutment 87 - Animal with Rider 90 - Foreign Matenal in Road 93 - Pothole 97 - None
		Oriver Full Name	NA FT. Street Address		ity and State	59 - Non-breakaway Sign 74 - Ditch	98 · Other Telephone No
UNIT	DRIVER		U. FREEMAN 162	8 MOHAUE	DL Class DL Status	AZ 853	Endorsements Residence Less
NO LEFT SCENE		0 0 1 2 1962 B Month Cay Year		\$1070	DU	Not Complied With Not	Complied With Than 25 Miles Yes No
		Place of Employment USAF - 1	LUKE ALL FORCE		Liability Insurance Co.	-52LF 3	Security No. 51 54 5215
		Driver No Defect Condition: 2 · Apparently Asleep	p 4 - III 9 - Unknown Souriety Op	ficer's Alcohol: Yes inion: Drugs: Yes No	Unk Given:	1 - Blood Test 3 - Urine Test 2 - Breath Test 4 - Unable to Admi Contr Circumstance Prime Harm	
			RMICHARL KD	d Code Travel Direct	A-Not on Rd U-Unk	27 License Tag Number	_ ! / [
COW		Veh Year Make 2003 FORD Owner's Name	Model Body V.I.N. TAU 4-P IFAF Street or R.F.C	P554031	3 27 20 48	W46 H5	State ZIP
VEH.		BUOTALTR	ENT A CAR 347	O SECMA	- HWY M	Settoon ERY Contributing Defect	Circle areas Damaged
UNIT 1	VEHICLE	Type Auto 11 - Moped	Personal 10 - Police	None 2 Mobile H	7 - Camper Trailer	97 None 9 · Windows/ 1 · Brakes W. Shield	On Diagram 10 Under Carriage
		2 - StaWagon 12 - M. Scoote 3 - Pick Up 13 - Pedal Cyc 4 - Van 14 - Farm Mac	cle 3 - Construction Business 3	S - Gas 2 - Mobile 17 S - Flam/Combust Liq. 4 - Utility Tr	iler 9 - Tanker	2 - Steering 10 - Restraint Sys 3 - Power Plant 11 - Wheels	
		5 - Truck Tractor 15 - Train 6 - Other Truck 16 - Road Equ	Paramedical Transport. 5	i - Flammable Solids 5 - 4-Wheel i - Oxidizer/Peroxide 6 - Boat Trai	Trailer 11 - Double Trailer	4 - Suspension 12 - Truck 5 - Tires Coupling	95 N/A
		7 - Comm. Bus 17 - Ridden A 8 - School Bus 18 - M. Home	nimal 6 - Taxi 98 - Other 7	7 - Poison Oversized 8 - Radioactive Matl. (Dec. Rec		6 - Exhaust 13 - Cargo 7 - Lights 14 - Fuel System	7 9 3
		9 - Other Bus 19 - ATV 10 - Motorcycle 98 - Other	8 - Agriculture	3 - Corrosive Material (Req. Per Yes No	<u>~</u> 1	8 - Turn Signal 98 - Other 99 - Unknown	6 5
		Speed Limit Est. Spe		image 1 - None Visible everity 2 Not Disabled 3 - Disab	led Vehicle Towed Away?	Occupants in Unit Total Injuries in Uni	t 11 Attachment Enter Point of
		Vehicle Towed By Whom:	NA	Ta Where:	ν.	A	Initial Impact
2		Oriver/Pedestrian Full Name	Street Address A MANNING 1617		City and State Mon ZABETH CT.	Ha 3611	7 260 3700
UNIT No		80422 1965	Race Sex DL State Driver License No.	•	DL Class DL Status	Not Complied With No	t Endorsements Residence Less t Complied With Than 25 Miles
	DRIVER	B Month Day Year C	w = Ac 4839 2		Liability Insurance Co.		at Security No.
LEFT SCENE		Driver/Ped No Defect	3 - Fatigued 8 - Other Sohriety Of	fficer's Alcohol: Yes No	Unk Type Test No Test		5 Refused Test Results
		Condition: 2 - Apparently Aslee Maneuver/Action Travel Roa	ep 4 · III 9 · Unknown Vi	ad Code Travel Direc	<u> </u>	Contr Circumstance Prime Harr	n Event Loc
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		1993 · TUF1 Owner's Name	530 (4-10) 7 X X Street or R.F.	142100 PN	City	3/40)-	State ZIP
		SAME Type	1	azardous Cargo Attachment	7 - Camper Traileg	Contributing Defect	Circle areas Damaged
	'	Auto 11 - Moped 2 - StaWagon 12 - M. Scoot 3 - Pick Up 13 - Pedal Cy	ter 2 - Briver Trng. 11 - Other	None None 2 - Explosive 2 - Mobile H 3 - Gas 3 - Semi Tri	Home 8 - Towed Vehicle	1 - Brakes W. Shield 2 - Steering 10 - Restraint Sy	10 Under Carriage
	VEHICLE	4 - Van 14 - Farm Ma 5 - Truck Tractor 15 - Train	ach. 4 - Ambulance/ 12 - Bus/Pass.	4 - Flam/Combust Liq. 4 - Utility To 5 - Flammable Solids 5 - 4-Wheel	railer 10 - Pole Trailer	3 - Power Plant 11 - Wheels 4 - Suspension 12 - Truck	95 N/A
		6 - Other Truck 16 - Road Equ 7 - Comm. Bus 17 - Ridden A		6 - Oxidizer/Peroxide 6 - Boat Tra 7 - Poison Oversized		5 - Tires Coupling 6 - Exhaust 13 - Cargo	7 9 3
		8 - School Bus 18 - M. Home 9 - Other Bus 19 - ATV	8 - Agriculture	9 - Corrosive Material (Req. Pe	rmit) Have Permit?	7 - Lights 14 - Fuel Syster 8 - Turn Signal 98 - Other	
		10 - Motorcycle 98 - Other Speed Limit Est. Sp	eed Citation Offense Charged D	amage 1 None Visible 2 Disa	Vehicle Towed Away	99 · Unknown Coccupants in Unit Total Injuries in Unit	it 6 5 4
		Vehicle Towed By Whom:	NA DIFFERST OF JUS. S	everity 2 Not Disabled To Where.	Yes No		Enter Point of Initial Impact
C		Contributing Circumstances		Priver Maneuver 11 - Go Straight Ahead 13 - Righ	1 Turn 63 - P	Pedestrian Acti	ter-Intersection 1 - On Roadway
0	,	32 - Improper Lane Change, Usage 14 F 03 - Improper Turn/U Turn 15 - 1 04 - Following Too Close 16 - 1	Road Defect 26 Veh Left Road C Vision Obstruction 27 Driver Not in Control C Defective Eguipment 28 Load Shift C	72 - Pass on Left 14 - Left 73 - Pass on 1-Way Street 15 - U-Tu 74 - Pass on Right 16 - Start	Turn irn 64 - P t from Park 65 - P	Traffic off Rd 02 - Cross/En edlCyc Ride Across Road 03 - Walk in F edlCyc Ride in Bike Path 04 - Walk in F	ter—Other Road—With Traffic Road—Against Traffic 4 Driveway
D	·	95 - Misjudge Stopping Dist 17 (96 - Over Speed Limit 18 - 1 97 - Avoid Object/ Person/Veh 19 - 1	DUI 29 Parts: Cargo from Veh Under Min Speed 30 Ped Violation (Improper Load/Size 31 Veh Wgt/Hgt Lngth (I	05 - Go Straight—Left Turn Lane 17 - Start 06 - Go Straight—Right Turn Lane 18 - Slow 07 - Change Lanes—Left 19 - Stop	t in Traffic 70 - E ying/Stopping 71 - P ped in Traffic 72 - P d Object in Road 81 - B	arked—Legally 06 Get on/of or Push/World of Or Push/World or In Road—	ork on Vehicle Property Other Work 6 In Intersection
E S		U9 Improper Backing 21 10 Inop Traffic Control 22 11 Improper: No Signal 23	Fail to Yield Right-of-Way 33 - Illegal Improper Parking Condition 97 - None Wrong Side of Road 98 - Other	39 Merge—Left 21 Exitin 10 Merge—Right 60 Pedil	on Private Road/Property 86 - P	ushed By Vehicle 10 - In-Road— ushed By Pedestrian 11 - Not in Ro lther 98 - Other	-Other
		10 Inop Traffic Control 22 11 Improper: No Signal 23	Driver Condition 97 None Wrong Side of Road 98 Other	10 Merge—Right 60 Pedli 11 Wrong Side of Road 61 Pedli	Cyc Ride with Traffic in Road 87 P	ushed By Pedestrian 11 - Not in Ro	-Uther ad

SEATING	Other Involved Unit Other Inv
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CODES	Injury Type Fiected 83 None Used
NARRATIVE AND DIAGRAM	CARMICHAEL READ TO TRINITY BLUD. Officer's Opinion of What Happened. DRIVER SE VEHICLE #2 STATED THOSE SHE WAS STOPPED BEHIND TRAFFIC IN THE LEFT LANG. DRIVER OF WEHILLE #1 STATED THOSE SHE WAS COSTS INTERIOR BULLDINGS AT THE TIME. VEHICLE #1 COCLIDED INTO VEHICLE #2
ROADWAY ENVIRONMENT DY V	For Each Roadway Environment Field, Circle One Entry for Each Involved Unit: Unit 1 Road Detects Road Detects Asphalt 2 2-Wet 3 3-Brick 3 3-Brick 3 3-Brick 8 8-Other 8 8-Other 8 8-Other Vision Obscured By: Vision Obs
INVES	Light Weather Locale Control Device WA Non-Vehicular Property Damage Property Damage Description Daylight 4 - Darkness—Road Dicter 5 - Sleet/Hail 2 - Cloudy 6 - Crosswind 3 - Rain 7 - Fog Table of the South State of the S